

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

BURTON TRUCK LINES, INC.,

Respondent.

**Docket No. FMCSA-2008-0144¹
(Midwestern Service Center)**

FINAL ORDER

On February 22, 2008, the Federal Motor Carrier Safety Administration (FMCSA) Illinois Division Administrator served a Notice of Claim (NOC) on Burton Truck Lines, Inc. (Respondent). The NOC, based on a January 22, 2008, compliance review, charged Respondent with one violation of 49 CFR 395.3(b)(2), requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days, with a proposed civil penalty of \$5,610.

On March 31, 2008, the Field Administrator for FMCSA's Midwestern Service Center (Claimant) issued a Notice of Default and Final Agency Order (NDFAO) based upon Respondent's failure to timely respond to the NOC. The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective April 8, 2008, with the civil penalty immediately due and payable on that date.

On April 7, 2008, Respondent served a Motion for Reconsideration of Default, to Vacate Final Agency Order, and for Leave to File Reply Instantly and Reply to Notice of

¹ The prior case number was IL-2008-0329-US1202.

Claim and Request to Submit Evidence without Hearing (Petition for Reconsideration).

Respondent contended that the failure to timely respond to the NOC was due to excusable neglect because its counsel inadvertently failed to calendar the due date for replying to the NOC. In its reply to the NOC, incorporated into its Petition for Reconsideration, Respondent admitted violating § 395.3(b)(2), but argued that the amount of the proposed civil penalty was excessive because the Agency overstated the extent of the violations in calculating the penalty. Although 49 CFR 386.64(c) permits any party to serve an answer to a Petition for Reconsideration within 30 days of the service date of the petition, Claimant did not serve a response.

On May 1, 2008, Respondent submitted a petition for administrative review of the conditional safety rating it received following the January 22, 2008, compliance review. Petitioner argued that its conditional rating was assigned in error because it was based on a flawed finding of a pattern of noncompliance with § 395.3(b)(2). Respondent alleged that the finding was flawed because the FMCSA investigator failed to follow the record sampling guidelines set forth in the Agency's Field Operations Training Manual (FOTM). On August 11, 2009, I directed Claimant to respond to Respondent's allegations and, following consideration of Claimant's response, I concluded that the investigator followed the FOTM sampling guidelines. Accordingly, I denied the petition for administrative review on October 22, 2009.²

On December 11, 2009, Claimant served a Notice of the Field Administrator's Withdrawal of Notice of Final Agency Order and Field Administrator's Motion for Entry

² See *In the Matter of Burton Truck Lines*, Docket No. FMCSA-2008-0155, Order, August 11, 2009; Decision on Petition for Review of Safety Rating, October 22, 2009.

of Final Order on the Notice of Claim (hereafter Motion for Final Order). Claimant asserted that “at some point” after Respondent filed its Petition for Reconsideration, the Midwestern Service Center withdrew the NDFAO, “leaving the Reply intact and pending.”³ Claimant argued that the only issue remaining to be determined is the appropriateness of the civil penalty calculation and submitted a copy of a Uniform Fine Assessment (UFA) worksheet and an Enforcement Case Report in support of the penalty calculation.

On December 24, 2009, I issued an Order stating:

“...[U]nder 49 CFR 386.16(a)(1), where the respondent has opted to submit written evidence without a hearing in response to the NOC, Agency Counsel must serve all written evidence and argument in support of the NOC no later than 60 days following service of the respondent’s reply. Once Claimant withdrew the NDFAO, the reply submitted by Respondent with its Petition for Reconsideration became, by Claimant’s own admission, ‘intact and pending.’ At that point in time, the 60-day clock for responding to that reply began to run. However, as noted above, Claimant failed to provide any evidence indicating when the NDFAO was withdrawn. Therefore, I am unable to determine whether Claimant’s Motion for Final Order was timely filed in accordance with § 386.16(a)(1).”

Consequently, I directed Claimant to submit for the record evidence showing when the NDFAO served on March 31, 2008, was withdrawn. Claimant responded to this directive on January 12, 2010.

Claimant stated that the NDFAO was withdrawn by the Midwestern Service Center’s Enforcement Program Coordinator on or about March 31, 2008. As evidence of withdrawal of the NDFAO, Claimant submitted a printout from the Agency’s Enforcement Management Information System (EMIS). The EMIS printout includes an entry dated March 28, 2008, stating that the “response received was timely” and the “FA

³ See Motion for Final Order, ¶ 2.

excused the later reply because it was not the fault of the carrier,” and an entry dated March 31, 2008, stating that the NDFAO was reviewed and later rescinded.⁴

Claimant contended that although the decision to accept Respondent’s reply to the NOC as timely was made on or about March 31, 2008, the 60-day clock for him to respond to the reply in accordance with § 386.16(a)(1) did not begin to run until October 22, 2009, the date of my decision denying Respondent’s safety rating appeal. According to Claimant, the only issue raised by Respondent’s reply was the amount of the civil penalty, which “could not be addressed in any meaningful way until the Assistant Administrator rendered her decision in the...rating appeal.”⁵

Claimant’s argument is based on two fundamental misconceptions. The first misconception is that there is an exception to the 60-day response deadline established in § 386.16(a)(1) when a respondent has filed a safety rating appeal raising issues related to Claimant’s enforcement case. No such exception exists. Section 386.16(a)(1) unambiguously requires Agency Counsel to serve all written evidence and argument in support of the NOC no later than 60 days following service of respondent’s reply. Therefore, Claimant was required to serve his evidence and argument on or about June 2, 2008. If Claimant believed it was necessary to seek an extension of this deadline based on his alleged inability to address the issues raised in Respondent’s reply, he could have requested one. He failed to do so.

⁴ See Exhibit 1 to Field Administrator’s Response to Assistant Administrator’s Order of December 24, 2009. Based on the March 28 EMIS entry, it is puzzling why an NDFAO was issued three days later.

⁵ Field Administrator’s Response to Assistant Administrator’s Order of December 24, 2009, page 3.

The second misconception in Claimant's argument is his contention that he could not meaningfully respond to the reply to the NOC until after a decision was issued in Respondent's safety rating appeal. The Assistant Administrator is the Agency decisionmaker for enforcement cases brought under 49 CFR part 386 and safety rating appeals brought under 49 CFR part 385. The fact that an issue may have been pending before the Assistant Administrator in a part 385 safety rating appeal did not preclude Claimant from addressing that issue in a related part 386 enforcement case. The Agency's regulations do not require the Assistant Administrator to issue a decision in a safety rating appeal before addressing the same or related issues in an enforcement case involving the same entity. Claimant clearly had the ability to address the issues raised in Respondent's reply within the 60-day period provided in the Rules of Practice. He could have defended the sampling methodology and presented evidence regarding the penalty calculation in June 2008, just as he did in December 2009. Consequently, there was no basis for Claimant's conclusion that the 60-day deadline in the enforcement case did not begin until after the safety rating appeal was resolved.

A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.⁶ Notwithstanding Respondent's failure to show any material facts in dispute, Claimant must establish a *prima facie* case; in other words, he must present evidence clearly

⁶ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993 (Order, December 5, 1991).

establishing all essential elements of his claim.⁷

In this case, I cannot consider Claimant's evidence regarding the civil penalty calculation because it was not timely filed in accordance with § 386.16(a)(1). Therefore, I am unable to determine whether the penalty was properly calculated in accordance with 5 U.S.C. § 521(b)(2)(D) and no civil penalty will be imposed. However, as noted in my December 24, 2009, Order, Respondent's reply to the NOC admitted the § 395.3(b)(2) violation alleged in the NOC. Consequently, it was unnecessary for Claimant to provide any evidence in order to establish a *prima facie* case that the violation occurred.⁸

In conclusion, I find that Respondent violated 49 CFR 395.3(b)(2), as alleged in the Notice of Claim served February 22, 2008. For the reasons discussed above, Claimant's motion for a final order imposing the \$5,610 civil penalty proposed in the NOC is denied.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

3-5-10
Date

⁷ *Id.*

⁸ See *In re Executive Express Trucking, Inc.*, Docket No. FHWA-1997-2499, Final Order (September 14, 1999), citing *In re Lakeview Farms, Inc.*, Docket No. R3-91-157, 58 Fed. Reg. 62481, 63482, Final Order (February 3, 1993).

CERTIFICATE OF SERVICE

This is to certify that on this 8 day of March, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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